No. 14367

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN COLLINS,

*Appellant,*

v.

ROBERT A. HEINZE, Warden of California State Prison at Folsom,

*Appellee.*

## APPELLEE'S BRIEF

On Appeal From the United States District Court for the Northern District of California, Northern Division


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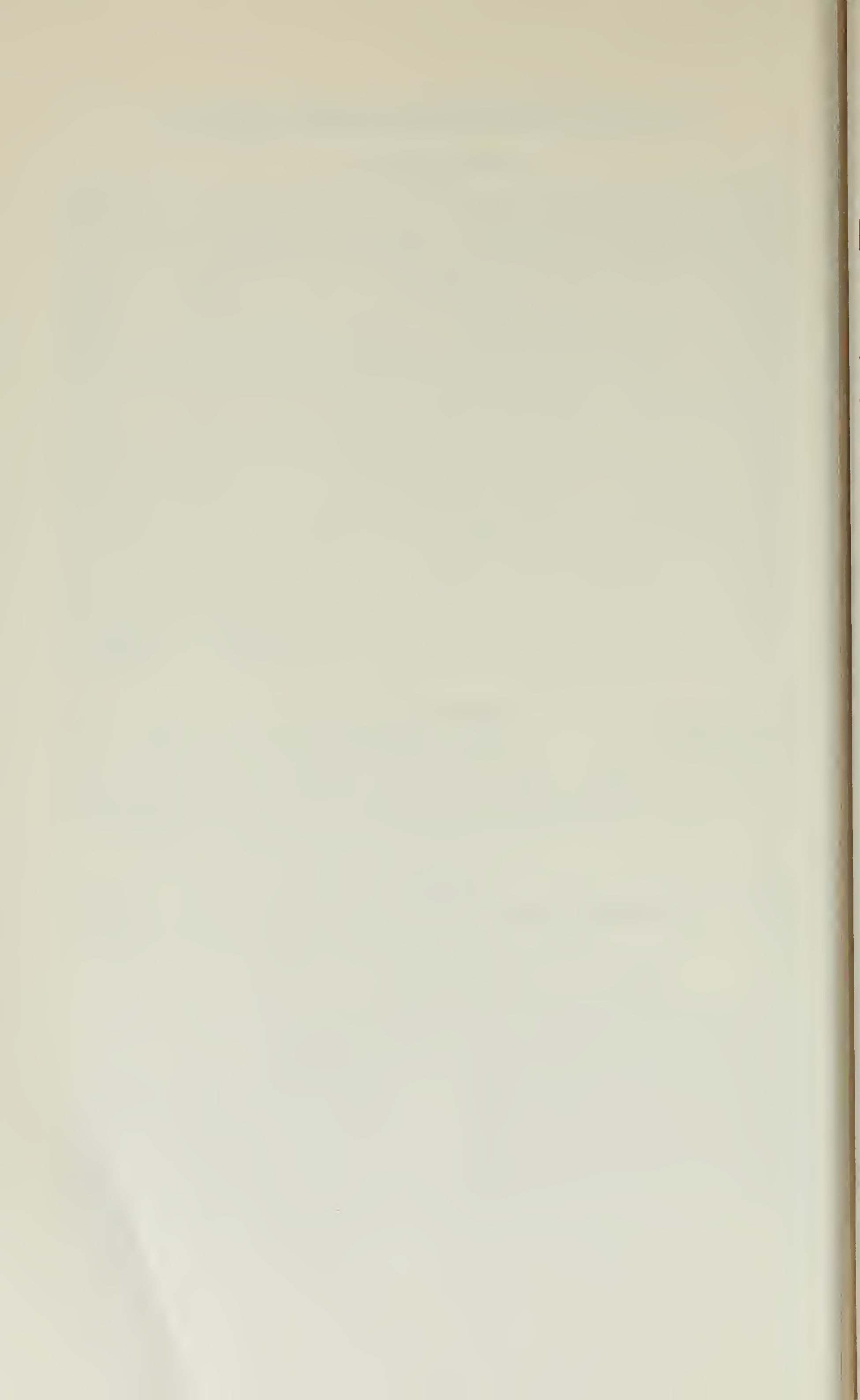

No. 14367

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN COLLINS,
*Appellant,*
v.
ROBERT A. HEINZE, Warden of California State Prison at Folsom,
*Appellee.*

## APPELLEE'S BRIEF

### On Appeal From the United States District Court for the Northern District of California, Northern Division

## STATEMENT OF THE CASE

On January 8, 1954, appellant filed a petition for writ of habeas corpus with the United States District Court for the Northern District of California, Northern Division (TR[1] 1-59). On that day, an order to show cause was issued by said court (TR 60). On January 18, 1954, appellant made application for the appointment of counsel (TR 61-62). On the same day, the application was denied without prejudice by said court (TR 63). On January 19, 1954, appellee filed his Return to the Order to Show Cause and Motion to Dismiss (TR 64-82), and lodged with the court a record of the state court proceedings in the case of

[1] Tr. refers to Clerk's Transcript of Record on Appeal.

*People* v. *Collins*, 117 Cal. App. 2d 175, 255 P. 2d 59 (TR 64-82, 140-141). On January 28, 1954, appellant filed a "Traverse to Respondent's Return to Order to Show Cause and Motion to Overrule Respondent's Return and Issue Writ" (TR 83-110). A hearing was had before said court on February 1, 1954, at which time it was ordered that the appellee submit a transcript of that portion of appellant's trial wherein appellant dismissed his counsel and the matter was continued to February 15, 1954 (TR 110-A). On February 15, 1954, appellee filed with the court a copy of the proceedings had on April 21, 1952, in the matter of *People of the State of California* v. *John Collins*, No. 147693 on the files of the Superior Court of the State of California, in and for the County of Los Angeles, prepared and certified by the official court reporter of Los Angeles County (TR 111-114). On February 16, 1954, appellee filed "Supplemental Points and Authorities" in support of his Return and Motion to Dismiss. A copy of said transcript of April 21, 1952, was supplied to appellant by the court and on February 24, 1954, appellant filed an "Answer to Court's Letter and Respondent's Supplement and Motion to Subpena Record on Appeal" (TR 115-131). On March 4, 1954, appellant filed "Answer to Court Order to the Respondent to Submit a Transcript of the Portion of the Trial Wherein the Petitioner Dismissed His Counsel" (TR 132-139).

On March 4, 1954, the United States District Court for the Northern District of California, Northern

Division, issued its "Memorandum and Order" denying the petition for writ of habeas corpus (TR 140-148). On March 16, 1954, appellant filed a "Motion for leave to file and to appeal in forma pauperis from Adverse Memorandum and Order of this Court denying the Petition for Writ of Habeas Corpus" (TR 149-161). On March 16, 1954, the District Court issued a certificate of probable cause in the following language:

> "Believing that petitioner's claim that he did not understandingly waive his right to counsel in the state trial court presents a justiciable question, and solely for that reason, the undersigned issues this certificate of probable cause." (TR 162.)

On April 22, 1954, the time to docket said appeal was extended to June 1, 1954, and on May 25, 1954, the appeal was docketed in this court (TR 164).

## HISTORY OF PRIOR PROCEEDINGS

On June 16, 1952, appellant was found guilty in the Superior Court of the State of California, in and for the County of Los Angeles, of two counts of assault with a deadly weapon, one count of burglary in the first degree, and one count of grand theft, as well as a prior felony conviction for which appellant had served a term of imprisonment in a state penitentiary (TR 65, 72-79). This judgment was affirmed on appeal by the District Court of the State of California, in and for the Second Appellate District, Division Two, in the case of *People* v. *Collins,* 117 Cal. App. 2d 175,

255 P. 2d 59. A petition for rehearing was denied by said District Court of Appeal on April 15, 1953, and appellant's petition for a hearing by the California Supreme Court was denied on April 30, 1953 (*People* v. *Collins,* 117 Cal. App. 2d 175, 185; 255 P. 2d 59). Appellant's petition for writ of certiorari was denied by the United States Supreme Court on October 12, 1953, his petition for rehearing was denied by that court on November 9, 1953, and a second petition for rehearing was denied by that court on November 30, 1953 (*Collins* v. *California,* 346 U. S. 803, 880, 904; 98 L. Ed. Adv. 34, 67, 154; 74 S. Ct. 33, 117, 216).

On June 17, 1953, appellant filed a petition for writ of habeas corpus with the District Court of Appeal of the State of California, in and for the Third Appellate District, numbered 3 Crim. 2464, seeking to have the warden of the state prison compelled to allow appellant the use of law books at night in his cell. This petition was denied without opinion by said court on June 18, 1953. A petition for writ of habeas corpus was filed with the District Court of Appeal of the State of California, in and for the Third Appellate District, numbered 3 Crim. 2488, on September 17, 1953, seeking to have the Adult Authority of the State of California ordered to fix appellant's term without delay. This petition was denied without opinion by said court on September 25, 1953. On October 22, 1953, a petition for writ of habeas corpus was filed with the California Supreme Court, numbered 5545 on the files of that court, wherein appellant sought to have the

Adult Authority ordered to fix his term of imprisonment. This petition was denied by the California Supreme Court on November 12, 1953, and certiorari denied by the United States Supreme Court on April 12, 1954, in 411 Misc. October Term 1953.

## STATEMENT OF FACTS

Appellant was accused by information filed in the Superior Court of the State of California, in and for the County of Los Angeles, of five felonies: (1) assault with a deadly weapon with intent to commit murder upon Joseph Burger; (2) burglary of the home of Joseph and Lillian Burger; (3) robbery of Joseph Burger by taking a $2,000 ring from his person; (4) grand theft by taking $19,000 worth of jewelry and money from Joseph and Lillian Burger; and (5) assault with a deadly weapon upon Lillian Burger. In addition, it was charged as to each count that appellant had been convicted in a county court of New York State of robbery and had served a term of imprisonment therefor in the state prison. Being without funds, a deputy public defender was appointed to defend appellant, but after about one month's service was relieved of the assignment and appellant thereafter represented himself. After a jury trial in which appellant actively participated, the jury found him guilty of (1) assault with a deadly weapon, a lesser included offense; (2) burglary in the first degree; (4) grand theft, and (5) assault with a deadly weapon, but not guilty of robbery (count 3).

He was found to have suffered a prior conviction of a felony and a term of imprisonment therefor. Probation was denied and he was sentenced for the term prescribed by law on all four counts of which he stood convicted, the sentences on 1 and 2 to run consecutively, and count 4 to run consecutively to counts 1 and 2 and count 5 to run consecutively to counts 1, 2 and 4.

On appeal, the District Court of Appeal of the State of California, in and for the Second Appellate District, Division Two, after a review of the entire record, found that appellant's conviction was proper and affirmed the judgment of the trial court in *People* v. *Collins*, 117 Cal. App. 2d 175, 255 P. 2d 59. A hearing was denied by the California Supreme Court and certiorari by the United States Supreme Court.

## The Allegations of the Petition for Writ of Habeas Corpus

Appellant in his petition for writ of habeas corpus filed in the United States District Court challenged the legality of the judgment and commitment under which he was held in the state prison on some 41 grounds (TR 7-57; A. O. B. pp. 5-8). The majority of the points sought to be raised were fully considered and rejected by the California courts on the direct appeal from the judgment and certiorari denied by the United States Supreme Court. As to the points which were not raised on the direct appeal, appellant would not have exhausted his state remedies and they would not be cognizable by the United States District

Court in a habeas corpus proceeding attacking the validity of a state court judgment (TR 141-142; *Darr* v. *Burford*, 339 U. S. 200, 94 L. Ed. 767, 70 S. Ct. 587).

These grounds may be summarized as follows: (1) that the proceedings prior to arraignment in the Municipal Court and the proceedings in the Municipal Court were in violation of the Fourteenth Amendment (TR 39, 53-57); (2) that the information was insufficient to support a conviction (TR 32-35); (3) that the trial court erred in allowing the introduction of inadmissible evidence (TR 14-16, 24, 31-32, 37); (4) that the trial court committed prejudicial error in its instructions, comments, and conduct (TR 11, 17-21, 24-29, 30-31, 36-38); (5) that the trial court denied appellant the process of the court to compel the attendance of witnesses (TR 29-30); (6) that the prosecution knowingly used false and perjured testimony to obtain his conviction (TR 39-51); (7) that the prosecution knowingly suppressed evidence favorable to appellant (TR 11-14, 36); (8) that the evidence was insufficient to support the verdict of the jury and judgment of the trial court (TR 9-11, 32); (9) that the prosecution was guilty of prejudicial misconduct in the arguments to the jury (TR 36); (10) that the procedure and action of the state appellate courts was erroneous and denied appellant due process of law (TR 8-9, 21-23, 38-39, 51-52); (11) that appellant was deprived of counsel in the trial and appellate courts of the State (TR 7-9).

## APPELLANT'S SPECIFICATIONS OF ERROR

In attacking the order denying the petition for writ of habeas corpus, appellant sets forth some 11 grounds of alleged error in the action of the District Court which may be summarized as follows: (1) in refusing to appoint counsel to represent appellant in the habeas corpus proceeding; (2) in failing to issue the writ of habeas corpus, to hold a full hearing thereon, or to determine the conflicting issues presented; (3) in finding that appellant waived his right to counsel in the trial court; (4) in failing to require appellee to serve appellant with a copy of the state court record including the supplement thereto filed in accordance with the court's order; (5) in showing personal bias and prejudice against the appellant; (6) in allowing appellee to file an unverified supplement in support of return to order to show cause; (7) in failing to subpena the record on appeal in the state courts; (8) in failing to allow appellant to amend his petition to support his allegation that false testimony was used; (9) in denying his writ of habeas corpus; and (10) in failing to forward a complete record to this court.

## APPELLEE'S SPECIFICATION OF ERROR

The sole ground upon which the certificate of probable cause was issued related to the question of whether appellant knowingly waived his right to counsel in the state trial court. The state courts fully considered this question on a direct appeal from the

judgment and found appellant had waived this right. Certiorari was denied by the United States Supreme Court. The United States District Court again reviewed the entire state court record including a supplement thereto and found that appellant had knowingly waived his right to counsel (TR 142-147).

Therefore the question before this court is whether in the light of the historical facts as found by the state courts and re-evaluated by the United States District Court, the finding that appellant waived his right to counsel in the state trial court was proper.

## SUMMARY OF ARGUMENT

I. The Facts Recited in the Petition When Considered in the Light of the Facts Which the District Court Must Judicially Notice Demonstrate That Appellant Knowingly Waived His Right to Counsel and That the Action of the State Courts Did Not Constitute a Lack of Due Process of Law

II. The District Court Did Not Err in Denying Without Prejudice Appellant's Application for the Appointment of Counsel in the Habeas Corpus Proceeding

III. The Procedure Adopted by the United States District Court in Disposing of This Matter Was Proper

A. Allegations II-VII, X-XX, XXII-XXXV, XXXVII, XXXIX and XLI of the Petition for Writ of Habeas Corpus Related Solely to Questions of State Law and Did Not Present a Substantial Federal Question (TR 8-11, 14-29, 30-39, 51-52, 53-57)

B. Allegations I, VIII, IX, XXI, XXXVI, XXXVIII, XL and XLI of the Petition for Writ of Habeas Corpus (TR 7-8, 11-14, 29-30, 39-51, 52, 57) When Considered in the Light of the Facts of Which the District Court Must Take Judicial Notice Do Not State Facts Which If Taken As True Would Raise a Substantial Federal Question

C. The Procedure Adopted by the United States District Court in Entertaining This Matter Followed the Standards Set Forth in Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397

## ARGUMENT

### I. The Facts Recited in the Petition When Considered in the Light of the Facts Which the District Court Must Judicially Notice Demonstrate That Appellant Knowingly Waived His Right to Counsel and That the Action of the State Courts Did Not Constitute a Lack of Due Process of Law

The record of the state court proceedings as well as appellant's own brief discloses that appellant was represented by counsel, a deputy public defender, at his preliminary examination in the Municipal Court. He was held to answer in the Superior Court and a deputy public defender appointed to represent him (CT 7).[2] This appointment was made on March 24, 1952 (CT 7). Time to plead to the information was continued until March 31, 1952 (CT 7). On March 31, 1952, appellant who was in court with his counsel was arraigned and entered a plea of not guilty to each count of the information and denied the prior conviction (CT 8). The matter was set for trial on May 13, 1952 (CT 8). On April 21, 1952, the matter was advanced on the calendar and appellant was in court with his counsel when the following proceedings occurred:

> "The Court: Collins.
>
> "Mr. Powell: If your Honor please, I now move to advance this matter, which is on the trial calendar for the 13th of May, for the purpose of making a motion to be relieved as counsel for the defendant.

[2] Ct refers to Clerk's Transcript in *Peo. v. Collins*, 117 C.A. 2d 175.

"The Court: Is that your desire, Mr. Collins, to substitute some other attorney in place of the Public Defender?

"The Defendant: Yes.

"Mr. Powell: Well, he indicates to me that he has no private counsel but that he does not desire my services in any sense of the word. He won't cooperate with me in preparing for his defense and has told me that he has no desire to be represented by my office or myself.

"The Court: Very well. Is that what you want to do?

"The Defendant: Yes, I would rather defend myself.

"The Court: Very well. The Public Defender is ordered relieved and the record will so show.

"The Defendant: I would like to make a motion that I would like to have examined the evidence—

"The Court: What do you mean?

"The Defendant: —taken in the case.

"The Court: You have already received a copy of the transcript.

"Mr. Powell: I would like to state that on the second day of April of this month I delivered the transcript personally to the defendant. He is still in possession of it, isn't that right, Mr. Collins? And I hereby show that I am handing to the defendant a copy of the Information and file in this matter, (handing same to defendant).

"The Defendant: May I be allowed to examine the data and the evidence in the case?

"The Court: What data do you want?

"The Defendant: Well, the——

> "The Court (Int'g): I don't know what you are talking about.
>
> "The Defendant: Particularly the data taken at the Venice Police Station.
>
> "The Court: You have a right to subpoena it for the time of trial if you want it.
>
> "The Defendant: May I examine it before then?
>
> "The Court: No. You can subpoena it for the time of trial. That is where you are making a fool out of yourself by discharging you attorney. He can look at these things and interview witnesses and you can't do it.
>
> "The Defendant: I have no confidence in the Public Defender.
>
> "The Court: That is all right then. That is all." (TR 112-114.)

When the case was called for trial, the appellant advised the trial court that he was ready (CT 9, RT[3] 8). The trial record further discloses that the court endeavored to convince appellant prior to his trial of the necessity for counsel, but appellant specifically refused counsel (RT 70, 77, 188). In no instance did appellant dispute the statements of the trial judge or request the appointment of counsel (RT 70, 77, 188).

Appellant herein in urging the contention of the deprivation of counsel in his "Appellant's Opening Brief on Appeal" filed in 2 Crim. 4918 (*People* v. *Collins*, 117 Cal. App. 2d 175) stated:

> "On March 24th, in the Superior Court at Santa Monica, without the consent of the Appellant who

[3] Rt refers to Reporter's Transcript in *Peo.* v. *Collins*, 117 C. A. 2d 175.

was satisfied with Public Defender, John Cole, who represented him at the preliminary examination, Public Defender Elias Powell was appointed as Counsel for the Appellant, Mr. Powell consulted with the Appellant in the crowded attorney Room at the Los Angeles County Jail. It was there that Mr. Powell tried to persuade Appellant to plead guilty, even though the Appellant protested that he was not guilty. Mr. Powell told Appellant that he would defend him only upon the condition that Appellant avoid questioning the witnesses and let him (Mr. Powell) handle the entire matter. Appellant told Mr. Powell, that he would not give up his right to defend in person as well as with counsel.

"On April 21st, in the Superior Court at Santa Monica, Public Defender, Powell moves to be relieved as the defendant's counsel (Cl. Tr. 9-16).

"Appellant made a motion to be allowed to examine the evidence, the motion was denied (deleted from transcript) Appellant stated in court that he wanted to reserve the right to cross-examine the witnesses (deleted from transcript) That he had no confidence in the public defender because objected to this procedure (deleted from transcript) The Court did not offer to appoint another counsel. Thus Appellant was denied aid and assistance of counsel, which is a denial of due process of law." (AOB pp. 6-7, *People* v. *Collins,* 117 Cal. App. 2d 175.)

The District Court of Appeal in *People* v. *Collins,* 117 Cal. App. 2d 175, 182-183, in rejecting this contention of appellant herein, stated:

"Appellant complains that a deputy public defender was appointed to represent him; that in his

consultation with the lawyer, the latter undertook to persuade him to plead guilty; that when the deputy declined to act unless appellant would abstain from examining the witnesses, the officer on his own motion was relieved from further representing appellant. The latter now complains that the court did not offer to appoint other counsel and that such conduct is a denial of due process of law. In support of his proposition appellant cites discussions with the deputy that are not a part of the record. They cannot therefore be considered (*People* v. *Ruiz,* 103 Cal. App. 2d 146, 150 (229 P. 2d 73).) Unsworn statements of appellant as to purported occurrences which were not before the trial court for consideration cannot be reviewed on appeal (Ibid.). But even if the record warranted an inquiry into the alleged refusal of the court to appoint a second attorney to conduct the defense, how could it be known that any other lawyer would have accepted the task? It has been judicially declared that the public defender of Los Angeles County and his staff have higher than average ability in defending criminal actions. (*People* v. *Adamson,* 34 Cal. 2d 320, 333 (210 P. 2d 13).) As to the 'refusal' of the trial court to appoint another lawyer to represent appellant, the court was not obliged to force appellant to accept the service of other counsel after his unjustifiable refusal to permit the deputy public defender to conduct the trial. Relative to his complaint that the court refused to appoint other counsel, it is pertinent to observe that on the very first day of the trial the judge said to appellant, 'You refused counsel, and I tried to talk you into having counsel and if you had counsel you would know how to go

> about this . . . I was trying to do my best to have you to have counsel and you refused it . . . that is why I told you before you should have an attorney and that is why I tried my best to get you to have an attorney . . . this is a serious charge that is against you and I tried to insist on your getting an attorney . . .' In reply thereto appellant gave no indication that he desired the appointment of counsel but displayed an apparent zeal to act on his own behalf. From such record it is clear that appellant's complaint suggests no ground for reversal. Where a defendant requests permission to conduct his own trial, he cannot complain of the court's failure to appoint counsel for him (*People* v. *Acosta,* 114 Cal. App. 2d 1, 4 (249 P. 2d 316).)"

The record of the state trial further discloses that at no time did appellant ask the trial court to appoint other counsel to represent him, but on the contrary, appellant actively engaged in the defense of his case, cross-examining witnesses and presenting his own defense. The trial court assisted him as much as possible and the deputy district attorney made relatively few objections to appellant's procedure.

The United States District Court in accordance with the principles of *Brown* v. *Allen,* 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397, looked to the historical facts as found by the state courts, the age, intelligence of the accused, his familiarity with legal proceedings and the kind of issues against which he had to defend himself as well as his actions in the state courts. Further, the United States District Court ordered and had before it a transcript of the proceedings had

on April 21, 1952, in the Superior Court of the State of California, in and for the County of Los Angeles, the date on which appointed counsel was relieved by the court. Based on these records as well as appellant's own statements contained in his briefs filed in both the state and federal court, it appears that the finding of the District Judge contained in his memorandum opinion that appellant was not denied the right to counsel but understandingly waived this right is supported by the evidence (TR 142-147).

The right to counsel is one that may be waived under both state and federal law (*People* v. *Chessman*, 38 Cal. 2d 166, 174, 238 P. 2d 1001; *People* v. *Acosta,* 114 Cal. App. 2d 1, 249 P. 2d 316; *In re Connor*, 16 Cal. 2d 701, 108 P. 2d 10; *In re Jingles*, 27 Cal. 2d 496, 499, 165 P. 2d 12; *Brown* v. *Allen*, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; *Adams* v. *U. S.*, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435; *Bute* v. *Illinois*, 333 U. S. 640, 92 L. Ed. 986; *Chessman* v. *People,* 205 F. 2d 128; *Boyden* v. *Webb*, 208 F. 2d 201; *Dusseldorf* v. *Teets*, 209 F. 2d 754).

Under California law there is no requirement of an intelligence hearing before permitting defense in propria persona (*In re Connor*, 16 Cal. 2d 701, 709, 108 P. 2d 10; *People* v. *Cortze*, 108 Cal. App. 111, 290 P. 1083; *People* v. *O'Neill*, 78 Cal. App. 2d 888, 179 P. 2d 10; *People* v. *Simon*, 107 Cal. App. 2d 105, 236 P. 2d 855).

Thus it is apparent that appellant herein understandingly waived his right to counsel under the facts

and circumstances of the case. He was no stranger to criminal courts, having suffered a previous felony conviction. He had the advice of counsel at his preliminary examination, arraignment and for a period of approximately a month prior to trial. He stated in open court his lack of confidence in his counsel who was judicially recognized as competent and an expert in the field. He failed to ask for the appointment of other counsel and actively participated in his own defense. From appellant's history and actions in the state courts, the finding of the state and federal court that he impliedly waived his right to counsel is supported by the record and the record discloses no lack of fundamental fairness in the state procedure which would warrant the setting aside of a valid state court judgment. Appellant neither could nor did assume the burden of establishing that his waiver of counsel was not competently and intelligently made.

## II. The District Court Did Not Err in Denying Without Prejudice Appellant's Application for the Appointment of Counsel in the Habeas Corpus Proceeding

It has been uniformly recognized that the right to the aid of counsel does not exist in habeas corpus proceedings and that in these proceedings the court may decline to appoint counsel to represent the petitioner on the hearing and disposition of his petition for writ of habeas corpus (*Dorsey* v. *Gill*, 148 Fed. 2d 857, 877; *Brown* v. *Johnston*, 91 Fed. 2d 370; *Stidham* v. *U. S.*, 170 Fed. 2d 294).

In the federal courts, habeas corpus is a civil proceeding and is governed by the provisions of Title 28 U. S. C., Sections 2241 et seq. It is not a part of the criminal proceeding and therefore the constitutional right of one charged with crime to have the assistance of and to be heard by counsel does not entitle a convicted person to have counsel appointed to assist him in a habeas corpus proceeding to test the lawfulness of his confinement in a state penitentiary (*People* v. *Ragen,* 391 Ill. 419, 63 N. E. 2d 874, 162 A. L. R. 920; *Dorsey* v. *Gill*, 148 Fed. 2d 857). In *Brown* v. *Allen*, 344 U. S. 443, 502, the Supreme Court recognized that under the inherent power of a District Court, counsel might be appointed to represent a petitioner. This, however, was discretionary with the District Court. In the instant manner, where the application for counsel was denied without prejudice, it can hardly be urged that such denial constituted an abuse of the discretion vested in the District Court. The Sixth Amendment does not apply to the exercise of a judge's discretion in passing upon the sufficiency of a petition for issuance of a writ of habeas corpus, nor requires the appointment of counsel to represent a state prisoner in a matter pending before such District Judge long after the trial has been completed and the appeal determined by the state courts. The same rule has been applied by this court with relation to federal habeas corpus proceedings attacking the validity of federal judgments (*Brown* v. *Johnston,* 91 Fed. 2d 370).

Appellant's specification of error in regard to the denial of counsel by the District Court is without merit, particularly under the facts and circumstances of the instant case.

## III. The Procedure Adopted by the United States District Court in Disposing of This Matter Was Proper

In *Brown* v. *Allen,* 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397, Justice Frankfurter sets forth the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence by state courts. One of the requirements is that the petitioner must make out a *prima facie* case and that the application should be dismissed when it fails to state a federal question, or fails to set forth facts which, if accepted at face value, would entitle the applicant to relief (*Brown* v. *Allen,* 344 U. S. 443, 502).

### A. ALLEGATIONS II-VII, X-XX, XXII-XXXV, XXXVII, XXXIX AND XLI OF THE PETITION FOR WRIT OF HABEAS CORPUS RELATED SOLELY TO QUESTIONS OF STATE LAW AND DID NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION (TR. 8-11, 14-29, 30-39, 51-52, 53-57)

A writ of habeas corpus may not be used as a substitute for an appeal or in lieu of a second appeal (*In re Dixon,* 41 Cal. 2d 756, 264 P. 2d 513; *Sunal* v. *Large,* 332 U. S. 174, 91 L. Ed. 1982, 67 S. Ct. 1588; *Goto* v. *Lane,* 265 U. S. 393, 68 L. Ed. 1070, 44 S. Ct. 525; *Chessman* v. *People,* 205 Fed. 2d 128; *Brown* v. *Allen,* 344 U. S. 443, *supra*).

Appellant was represented by counsel during the proceedings in the Municipal Court and for approximately one month subsequent to his arraignment in the Superior Court. Any question as to the validity of the proceedings prior to appellant's arraignment in the state Superior Court under California law should have been raised by motion to set aside the information or would have been waived (Penal Code Sections 995, 996; *In re Dixon,* 41 Cal. 2d 756, 264 P. 2d 513).

In considering and rejecting this argument as to the invalidity of the proceedings prior to appellant's arraignment, the District Court of Appeal in *People* v. *Collins,* 117 Cal. App. 2d 175, 181, 255 P. 2d 59, stated:

> "Moreover, errors committed by the examining magistrate, if any, cannot constitute reversible error on appeal for the reason that they could not affect the jurisdiction of the superior court, after appellant's due and prompt committal. (*People* v. *Stuckrath,* 64 Cal. App. 84, 87 (220 P. 433).) Neither was there any delay in the filing of the information. The commitment of appellant was signed on March 5th; the information was filed on March 20th. (Pen. Code, Sec. 809.) But if there were any merit in appellant's complaint on this score, it would have been lost by his failure to present a motion in the superior court for a dismissal of the action. (*People* v. *Ganger,* 97 Cal. App. 2d 11, 12, 13 (217 P. 2d 41).)"

Thus it is apparent that the allegations of Paragraphs XXXVI and XLI of the Petition for Writ of Habeas Corpus (TR 39, 53-57) relate to points which

could not be reached on habeas corpus in the California courts and clearly do not present a point cognizable on federal habeas corpus (*In re Connor,* 16 Cal. 2d 701, 108 P. 2d 10; *In re Northcott,* 71 Cal. App. 281, 235 P. 458; *Brown* v. *Allen,* 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397).

Questions as to the sufficiency of the information (Par. XXVI, TR 32-35); the sufficiency of proof of the corpus delicti (Par. V-VI, TR 9-11); the alleged admission of improper evidence (Par. X, TR 14; Par. XI, TR 14-15, Par. XVI-XVIII, TR 24-25; Par. XXIII, TR 31-32; Par. XXXII, TR 37); the sufficiency of instructions (Par. VII, TR 11; Par. XXIX, TR 36); the sufficiency of the evidence to support the convictions (Par. XXIV-XXV, TR 32); the alleged misconduct of the judge and district attorney (Par. XIII, TR 17-21; Par. XIX, TR 25-28; Par. XX, TR 28-29; Par. XXII, TR 30-31; Par. XXIII, TR 31-32; Par. XXVII, TR 36; Par. XXVIII, TR 36; Par. XXX, TR 36-37; Par. XXXIII, TR 37-38) related to matters raised and rejected by the California courts on the direct appeal from the judgment and by the United States Supreme Court in its denial of certiorari (*People* v. *Collins,* 117 Cal. App. 2d 175, 255 P. 2d 59).

Errors of law in a state proceeding, not amounting to a denial of due process, are not subject to review by a federal court. (*U. S. ex rel. Bongiorno* v. *Ragen,* 146 Fed. 2d 349; *U. S. ex rel. Carr* v. *Martin,* 172 Fed. 2d 519; *Frank* v. *Mangum,* 237 U. S. 309, 35 S.

Ct. 582, 59 L. Ed. 969; *Watkins* v. *Duffy*, 197 Fed. 2d 816; *Barnes* v. *Hunter*, 188 Fed. 2d 86). The due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate the practice therein (*Lisenba* v. *California*, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166; *Adamson* v. *California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903; *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674). The function of federal courts on habeas corpus is not to correct alleged errors of state courts (*Tyson* v. *Swenson*, 198 Fed. 2d 308; *Sampsell* v. *California*, 191 Fed. 2d 721). Habeas corpus is only authorized when a state prisoner is in custody in violation of the Constitution of the United States (28 U. S. C. 2241; *Brown* v. *Allen*, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; *Frank* v. *Mangum*, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969).

By the allegations of the petition above referred to, it is patent that appellant has not made out a *prima facie* case of deprivation of his constitutional rights and these allegations fail to state a substantial federal question.

Appellant's further attacks on the appellate procedure of the state courts are without merit and fail to raise a substantial federal question (Pars. II-IV, TR 8-9; Par. XXXIV-XXXV, TR 38-39; Par. XXXVII, TR 39; Par. XXXIX, TR 51-52).

Appellant was given a normal record on appeal, pursuant to the Rules on Appeal of the State of California (36 Cal. 2d 26-31). He availed himself of

this appeal, prepared and filed briefs in the state courts. He petitioned for hearing in the California Supreme Court and certiorari in the United States Supreme Court. The full record of the proceedings at his trial was before each of these courts and each impliedly found that appellant had received a full, fair and impartial trial and that his constitutional rights were not violated.

Appellant in attacking the opinion of the District Court of Appeal as reported in *People* v. *Collins*, 117 Cal. App. 2d 175, 255 P. 2d 59, fails to recognize the cardinal principle that it is not the function of appellate courts to reweigh the evidence but that on appeal the evidence must be viewed in the light most favorable to the respondent (*People* v. *Newland*, 15 Cal. 2d 678, 104 P. 2d 778; *People* v. *Daugherty*, 40 Cal. 2d 876, 256 P. 2d 911). The fact that appellant disagrees with the factual statement contained in the opinion of the District Court of Appeal or the alleged failure of the Supreme Court of the State of California to correct such factual statement in accordance with appellant's interpretation of the facts is totally without merit as presenting a substantial federal question.

The further contention that the state appellate courts violated his constitutional rights in not appointing counsel to represent him or to allow appellant to orally argue his appeal does not present a federal question. Appellant was neither entitled to counsel on appeal as a matter of right nor was he entitled to orally argue his appeal. Questions of state appellate

procedure present matters of local law over which federal courts have no control (*Andrews* v. *Schwartz*, 156 U. S. 272, 274-275; *McKane* v. *Durston*, 153 U. S. 684, 687; *Chessman* v. *People*, 205 Fed. 2d 128). Any contention as to the correctness of the state record on appeal was a question properly presented to the state courts and one for their determination, not a matter presenting a substantial federal question to be considered by a federal district court on a collateral attack on a state court judgment (*Chessman* v. *People*, 205 Fed. 2d 128).

In *Andrews* v. *Schwartz,* 156 U. S. 272, 274-275, the United States Supreme Court recognized that the United States Constitution gives no right to appear in person or by counsel in a criminal appeal.

> "Whether to grant an appeal, and the terms upon which it will be granted are purely matters of local law over which federal courts have no control."

In *McKane* v. *Durston,* 153 U. S. 684, 687-8, it was stated:

> "A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such review. . . .
>
> "It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. . . . whether an appeal should be allowed, and if

so, under what circumstances or on what conditions, are matters for each state to determine for itself.''

Appellee submits that the points sought to be raised by appellant under Paragraphs II-VII, X-XX, XXII-XXXV, XXXVI-XXXVII, XXXIX and XLI (TR 8-11, 14-29, 30-39, 53-57) relate solely to questions of state law and do not present a substantial federal question. A dismissal of a petition for writ of habeas corpus based on such grounds is properly made by a federal court (*Brown* v. *Allen,* 344 U. S. 443, *supra*).

This court in the recent case of *Palakiko* v. *Harper,* 209 Fed. 2d 75, 80, cited with approval the statement of the Supreme Court of the Territory of Hawaii in 39 Haw. 167 (the same case) which is particularly pertinent to the issues sought to be raised by appellant and here considered:

> '' ' . . . A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies. . . . and then supersede those remedies on collateral attack, by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them.' ''

B. ALLEGATIONS I, VIII, IX, XXI, XXXVI, XXXVIII, XL AND XLI OF THE PETITION FOR WRIT OF HABEAS CORPUS (TR 7-8, 11-14, 29-30, 39-51, 52, 57) WHEN CONSIDERED IN THE LIGHT OF THE FACTS OF WHICH THE DISTRICT COURT MUST TAKE JUDICIAL NOTICE DO NOT STATE FACTS WHICH IF TAKEN AS TRUE WOULD RAISE A SUBSTANTIAL FEDERAL QUESTION

The allegations of Paragraph I of the Petition for Writ of Habeas Corpus relating to the denial of the

right to counsel have been fully considered under Point I of this Argument and show that appellant knowingly waived his right to counsel in the state courts. This finding made by the state courts and also by the District Judge on a complete review of the state record is fully supported by the facts as contained therein and the Memorandum and Order of the District Judge (TR 140-148).

The allegations of Paragraphs VIII and IX of the Petition for Writ of Habeas Corpus (TR 11-14) relate to the alleged improper conduct of the prosecuting attorney by wilfully suppressing adverse evidence. These allegations are completely refuted by the record of the state court. Appellant contends that a hat found at the scene of the crime, which the testimony showed was lost by police officers prior to trial, was not a size that appellant wore and the failure to produce this hat was urged as constituting the suppression of evidence favorable to appellant. The record disclosed that the appellant was allowed to question the officers fully about this hat; that the officer did find a hat but the article was lost prior to trial, which fact was fully developed at the trial. The matter was again urged on appeal and found to be without merit. In this regard the District Court of Appeal stated: (*People* v. *Collins,* 117 Cal. App. 2d 175, 180)

> "The asserted inconsistencies in the testimony such as Mrs. Burger's statement that the burglar wore heavy shoes with which he kicked her, the finding of a hat in the Burger bedroom of the size 7¼ whereas defendant claims to have worn size 7, are

> petty criticisms of the record and do not affect the general finding of the jury as to the sufficiency of the evidence generally to support the conviction."

Appellant contended that he was not allowed to introduce evidence that when he was apprehended he did not have in his possession other jewelry (which the testimony at trial showed was also taken from the premises). This was due to the prosecution's failure to charge him with an additional offense to which he could have established a defense and hence constituted the suppression of favorable evidence by the prosecution. This contention is without merit. Since appellant was not tried for such offense, the fact that he was not found with the fruits of the crime would hardly constitute a defense to the charges upon which he was tried and convicted. These alleged constitutional claims were not supported by any facts which if taken as true would have invalidated appellant's conviction or resulted in a deprival of any of his rights under either the state or federal constitutions.

In Paragraph XXI of the Petition for Writ of Habeas Corpus (TR 29-30) appellant alleged that he was denied the process of the trial court to compell the attendance of witnesses. In support of this contention he cited a portion of the transcript in the state court wherein the judge advised him to take the matter up with the clerk of the court. The transcript further showed that appellant did not know the name of the witness he wished to subpena or that her testimony would have been in any way material to the cause. No factual statement with relation to this contention

was made in the instant petition. The contention was rejected by the state court in the following language: (*People* v. *Collins*, 117 Cal. App. 2d 175, 184, 255 P. 2d 59).

> "Appellant complains that he was denied process to compel attendance of witnesses. He says that he 'asked the doctor to find out the name of the nurse and give it to the court so she could be subpenaed'; that the court promised to give the subpena to the sheriff, but, instead, the subpena was given to appellant for delivery to the sheriff. He asked the guards to deliver it to the sheriff and they refused to do so. Nothing is contained in the statements of appellant to indicate that he was denied process to enforce the attendance of witnesses. Matters outside the record may not be considered (*People* v. *Ruiz, supra.*)"

No showing was made by appellant that the alleged irregularity in the service of process was called to the attention of the trial court or that the court refused to take cognizance of the matter. It must be presumed on a collateral attack on a judgment that official duties were duly and regularly performed and the burden is upon a petitioner to establish by factual allegations the contentions of lack of due process of law. Thus where no facts have been presented showing that the matter was raised in the trial court, the alleged irregularity if any would have been waived and may not now be urged as a ground for the intervention of federal courts by habeas corpus (*In re Dixon*, 41 Cal.

2d 756, 264 P. 2d 513; *Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469).

In Paragraph XXXVIII of the Petition for Writ of Habeas Corpus (TR 39-51), appellant alleges that the prosecution knowingly used false and perjured testimony to obtain his conviction. To support this contention, appellant set forth isolated quotations from the transcript. The petition contains no factual statement showing what the actual facts were, the person connected with the prosecution who knew the testimony was perjured and persisted in using this testimony or the circumstances establishing such person's knowledge of the facts (*In re Swain*, 34 Cal. 2d 300, 209 P. 2d 793). No affidavits in support of said allegations were submitted showing that any of the witnesses who are alleged to have perjured themselves have recanted or to support the conclusion of appellant that the testimony was perjured. The question of veracity and credibility of witnesses was for the jury which resolved the matter contrary to appellant's contentions. The language of the California Supreme Court in the case of *In re Manchester*, 33 Cal. 2d 740, 742, 204 P. 2d 881, is directly applicable to this contention:

> "Allegations which merely go to show that testimony given at the trial was contradicted, and for that reason the falsity must have been known to the prosecution, are insufficient as a basis of knowledge of their alleged false nature. Reliance solely upon such inconsistencies and contradictions as a foundation for the allegation that false testimony

> was knowingly used by the prosecution presents questions merely of weight and credibility which generally are not reviewable even on appeal from the judgment. Therefore in his application the petitioner must set forth not only the facts which he contends prove perjury on the part of the witness and knowledge thereof on the part of the prosecution, but it must also be shown that those facts existed independently of the contradictions appearing at the trial. The facts alleged must also indicate that the petitioner had no opportunity to present the alleged true matter on the trial; that is, that there was such suppression of the truth by the authorities as prevented his discovery and use thereof at the trial. Otherwise the defendant on trial could himself suppress the facts and reserve a case for his later release."

Since appellant's allegations of perjury were based on conflicts contained in the state trial record, it is apparent that such allegations failed to present a substantial federal question (*Walker* v. *Johnston,* 312 U. S. 275; *Waley* v. *Johnston,* 316 U. S. 101; *Woollomes* v. *Heinze,* 198 Fed. 2d 577).

This case presented no question of the use of a coerced confession. Appellant's claim that he was beaten by police officers at the time of his arrest (Par. XLI, TR 57) was fully presented to the trial court on conflicting evidence and decided contrary to appellant's contentions. The sole testimony that appellant suffered a beating at the hands of the officers was appellant's. The testimony of the police officers was to the effect that at no time during the period that appellant was

in their custody was he physically mistreated (RT 317, 318, 352, 464, 474). The testimony of Dr. Miller who examined appellant shortly after his apprehension by the police officers was that there was no evidence of physical injury to appellant (RT 501-503, 506). The doctor who examined appellant at the time of his preliminary examination found no evidence that petitioner and appellant herein had been beaten (RT 513-515). The question of mistreatment was fully considered by the trial court on conflicting evidence even though under state rules it would have been deemed waived by failure to raise the question on motion to set aside the information (Penal Code Sections 995, 996; *In re Dixon,* 41 Cal. 2d 756, 264 P. 2d 513).

The record further shows that appellant herein failed to present these alleged constitutional points to the state courts on a post-conviction remedy of habeas corpus. If he sought to rely on material dehors the record, a necessary allegation would have been the exhaustion of state remedies. The petition for habeas corpus on its face fails to show this exhaustion of state remedies and therefore under the facts and circumstances of the case the petition was properly denied (*Woollomes* v. *Heinze,* 198 Fed. 2d 577; *Buchanan* v. *O'Brien,* 181 Fed. 2d 601; *Brown* v. *Allen,* 344 U. S. 443, *supra*).

Appellant's contention that the California Supreme Court denied him equal protection of the laws in denying him a writ of habeas corpus to compel the Adult Authority to fix his term of imprisonment (Par.

XL, TR 52), is totally without merit. The maximum sentence under his various convictions would be life (Penal Code Section 461). The authority for the fixing of terms subject to certain statutory minimums (Penal Code Section 3024) is granted to the Adult Authority and no period within which such action must be taken is fixed by statute (Sections 3020, 5077 of the Penal Code). The action of the California Supreme Court in denying the writ of habeas corpus was proper and such contention fails to present a substantial federal question (*Wells* v. *Duffy,* 201 Fed. 2d 503).

Appellee submits that the petition for writ of habeas corpus failed to state facts which if taken as true and considered in the light of the state court record would disclose any violation of appellant's constitutional rights and the action of the Federal District Court in denying the petition was proper.

### C. THE PROCEDURE ADOPTED BY THE UNITED STATES DISTRICT COURT IN ENTERTAINING THIS MATTER FOLLOWED THE STANDARDS SET FORTH IN BROWN v. ALLEN, 344 U. S. 443, 97 L. ED. 469, 73 S. CT. 397

Under Points III-XI of the Appellant's Opening Brief, pages 9-20, appellant attacks the procedure adopted by the District Court in this proceeding as well as the conclusion of the court that appellant had waived his right to counsel in the state courts.

An examination of the proceedings discloses that the District Court proceeded in accordance with the standards set forth in *Brown* v. *Allen*, 344 U. S. 443. After a consideration of the allegations on the face of

the petition, the District Court issued an order to show cause. Upon the Return to the Order to Show Cause, the appellee herein produced a copy of the state court record (*People* v. *Collins*, 117 Cal. App. 2d 175, 255 P. 2d 59). Under California law appellant had received a copy of this record at the time of his appeal (*People* v. *Smith*, 34 Cal. 2d 449, 211 P. 2d 561). Therefore it was unnecessary to serve appellant with another copy. Further, an examination of his petition for writ of habeas corpus discloses that reliance on the transcript and quotations therefrom were contained in the petition itself. After a hearing on the Return to the Order to Show Cause, the District Court requested that a reporter's transcript of the oral proceedings had on April 21, 1952, be procured by appellee. A transcript of these proceedings, certified as correct by the official court reporter of Los Angeles County was then filed with the court. It must be presumed that this record was correct (California Code of Civil Procedure, Section 1963 (15)). Appellant presented no facts showing the transcript to be in error but on the contrary it should be noted that the augmented record reflects the procedure admitted by appellant in his briefs in the state court and in the documents filed by him in the District Court. The procuring of the augmented transcript in accordance with the court's order was for the use of the District Judge in evaluating the merit of the contentions sought to be raised by the appellant. Appellant's argument to the effect that the District Court erred in requiring a record not before the appellate courts

of the state (the record of the proceedings of April 21, 1952) is frivolous. The state courts found that the normal record on appeal did not warrant any further inquiry into the alleged refusal of the court to appoint a second attorney for appellant as the record itself supported the fact that appellant had waived his right to counsel (*People* v. *Collins*, 117 Cal. App. 2d 175, 181, 255 P. 2d 59). The District Court to further protect appellant's rights, requested the additional record. Appellant cannot urge in good faith that the action of the District Court in requiring the supplementation of the state record by the oral proceedings had on April 21, 1952, in any way prejudiced appellant's rights. Further, it should be noted that appellant did receive a copy of these proceedings supplied by the District Court and full opportunity to reply thereto prior to the issuance of the District Court's order. Hence no possible prejudice could be shown by appellant from the procedure adopted by the District Court.

Appellant's contention that the District Court erred in allowing the appellee to file an unverified supplement to the return to the order to show cause, is without merit. As appears from the record, appellee did not file a supplement to the return to the order to show cause, but a supplement to the points and authorities filed in support of the order to show cause, which was in the nature of an additional brief.

Appellant's argument under Point VII of the brief that the court erred in not subpenaing the record on appeal in the state court is also totally without merit since at the time of the Return to the Order to Show

Cause a copy of such record on appeal was lodged with the District Court and before said court.

The argument that the District Court erred in failing to allow appellant to amend his petition with relation to his allegations of the use of perjured testimony, is without merit. An examination of the petition discloses that these allegations were based solely on conflicts in evidence of witnesses at the trial and based on the record of the state proceeding. The allegations merely relate to questions of the credibility of witnesses which was resolved against appellant by the state courts. No facts were alleged dehors the record showing the knowing use of perjured testimony by the prosecution. However, if such allegations had been made, appellant would first have had to raise these issues in the state court on a habeas corpus proceeding and exhaust his state remedies prior to presenting the matter in the federal courts.

Appellant's further argument that the District Court was guilty of bias and prejudice in the procedure adopted in the case is apparently based on the conclusion reached by the District Court that the petition should be denied and that appellant had knowingly waived his right to counsel in the state courts. The case of *People* v. *Zammora,* 66 Cal. App. 2d 166, 152 P. 2d 180, relied upon by appellant to support his contention that appellant was entitled to appear both in person and by counsel is not authority for his position. In the *Zammora* case, *supra,* the court held that the right of appellants to defend in person

and with counsel was unduly restricted by the seating arrangements of appellants in the courtroom which together with the rulings of the trial court prevented appellants from consulting with their counsel during the course of the trial or during the recess periods. In *People* v. *Zammora,* 66 Cal. App. 2d 166, 234-235, 152 P. 2d 180, the court stated:

> "The Constitution primarily guarantees a defendant the right to present his case with the aid of counsel. That does not simply mean the right to have counsel present at the trial, but means that a defendant shall not be hindered or obstructed in having free consultation with his counsel, especially at the critical moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon. At such time, in order that he may have absolute freedom to assist by suggestion and information in his own defense, the accused has the right to sit with his counsel, or at least to be so situated that he can freely and uninterruptedly communicate and consult with his attorney."

This case does not stand for the proposition that a defendant is entitled to have counsel and to present his own case at the same time. As the record disclosed appellant by his own acts and statements desired to control the course of his litigation. If, as appellant stated, he had no confidence in the Public Defender appointed to represent him (which Public Defender's office has been judicially recognized as fully competent) the court could not force appellant to accept the services of such counsel. Moreover, appellant at no

time requested that the Public Defender act in advisory capacity, but clearly demonstrated appellant's own desire to conduct his litigation himself. As stated in *People* v. *Looney,* 9 Cal. App. 2d 335, 338, 49 P. 2d 889:

> "The record does not show that the trial court compelled La Caster to act as his own counsel. Frequently a defendant in a criminal action feels that he can present his case more capably than an attorney. A defendant has a constitutional right to appear and defend in person. The fact that he does not win his case is no ground for a reversal of the judgment."

In *People* v. *Ansite,* 110 Cal. App. 2d 38, 39, 241 P. 2d 1036, the court in finding that a defendant was not convicted without benefit of adequate legal counsel where he represented himself at the time of trial, stated:

> "Likewise defendant is entitled to waive the assistance of counsel and where he does so, as in the instant case, of his own volition and with full knowledge of what he is doing, he cannot complain that he has not had a proper defense at the time of his trial. (*People* v. *Chessman,* 38 Cal. 2d 166, 173 (238 P. 2d 1001); *People* v. *Pearson,* 41 Cal. App. 2d 614, 619 (107 P. 2d 463).)"

To the same effect: *People* v. *White,* 115 Cal. App. 2d 828, 253 P. 2d 108; *People* v. *Justice,* 125 A.C.A. 716.

As recognized in *United States* v. *Mitchell,* 137 Fed. 2d 1006, the right to be represented by counsel and

the right to conduct a case in propria persona cannot be both exercised at the same time (See, *Sheldon* v. *U. S.,* 205 Fed. 2d 806; Ann. 157 A. L. R. 1225). Hence the language of the District Court contained in its memorandum order to this effect is supported by authority.

Appellant's argument that an incomplete record of the proceedings of the District Court was presented to this court on the appeal is frivolous. The Appellee's Points and Authorities filed in support of the Return to Order to Show Cause and Motion to Dismiss and the Supplementary Points and Authorities are in the nature of written briefs or arguments of counsel and not part of the record proper (*Black and Yates* v. *Mahogany Assn.*, 129 Fed. 2d 227, 237). The record of the state court proceedings (*People* v. *Collins*, 117 Cal. App. 2d 175, 255 P. 2d 59) was transmitted as an original exhibit. It would thus appear that appellant's specification of error XI with relation to the incomplete record is without merit.

As appears from a consideration of all the points sought to be raised in the petition, the majority of such points had been considered by the state courts on the direct appeal from the judgment (*People* v. *Collins*, 117 Cal. App. 2d 175-185, 255 P. 2d 59). An examination of this record by the District Court together with the supplementary record on the question of the waiver of counsel showed that the appellant was not entitled to relief in federal habeas corpus proceeding. Therefore the action of the District Court

in failing to hold a plenary hearing was proper (*Boyden* v. *Webb*, 208 Fed. 2d 201; *Brown* v. *Allen*, 344 U. S. 443, *supra; U. S. ex rel. O'Connell* v. *Ragen*, 212 Fed. 2d 272; *U. S. ex rel. Gawron* v. *Ragen*, 211 Fed. 2d 902).

In *Brown* v. *Allen*, 344 U. S. 443, 463, 73 S. Ct. 397, 97 L. Ed. 469, it is stated:

> "Applications to district courts on grounds determined adversely to the applicant by state courts should (result in) . . . a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required."

## CONCLUSION

Appellee submits that an examination of the record shows that the appellant received a fair and impartial trial in accordance with the laws of the State of California; that his constitutional rights were fully protected and in no instance were the circumstances surrounding the trial such as to shock the conscience of the court or make the proceedings a farce and mockery of justice. The record fully supports the finding of the State and Federal District Court that the appellant knowingly and understandingly waived his right to counsel and his conviction was the result

of a fundamentally fair proceeding (*Dusseldorf* v. *Teets*, 209 Fed. 2d 754; *Chessman* v. *People*, 205 Fed. 2d 128; *U. S. ex rel. O'Connell* v. *Ragen*, 212 Fed. 2d 272).

It is respectfully submitted that the order denying the petition for writ of habeas corpus should be affirmed.

Dated: Sacramento, California, June 30, 1954.

Respectfully submitted,

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